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Appellant's Brief 1976-SC-0024

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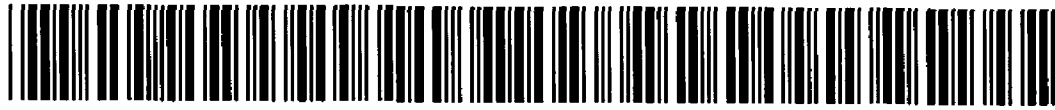
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APPELLANT'S BRIEF

SUPREME COURT OF KENTUCKY

File No. 76-24

HARGRAVE BONDING CO., INC., Surety - Appellant

versus

COMMONWEALTH OF KENTUCKY - - Appellee

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND DIVISION
LOUISVILLE, KENTUCKY

BRIEF FOR THE APPELLANT

FILED

FEB 17 1976

Martha Layne Collins
CLERK

Supreme Court of Kentucky

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This is to certify that copies of the within Brief have been served on Hon. Dave Armstrong, Commonwealth Attorney for the 30th Judicial District, Hon. Robert F. Stephens, Attorney General for the Commonwealth of Kentucky, and John P. Hayes, Judge, Jefferson Circuit Court, Criminal Division, the trial judge, pursuant to RCA 1.250.

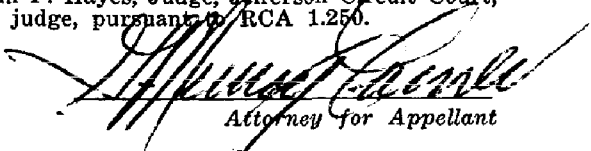

Attorney for Appellant

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STATEMENT OF QUESTIONS PRESENTED

1.) Was the Trial Court's order of forfeiture of the bail bond erroneous?

2.) Did the Trial Court err in entering Judgment after the stay, in that such stay suspended and rendered void all Judicial proceedings on the original Judgment, pending a Petition for Certiorari.

SUPREME COURT OF KENTUCKY

File No. 76-24

HARGRAVE BONDING Co., INC., Surety - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - *Appellee*

APPEAL FROM JEFFERSON CIRCUIT COURT
CRIMINAL BRANCH, SECOND DIVISION
LOUISVILLE, KENTUCKY

BRIEF FOR THE APPELLANT

STATEMENT OF CASE

On May 23, 1975, this Honorable Court issued an opinion affirming the Judgment of conviction for storehouse breaking against the Defendant, entered by the Jefferson Circuit Court (T.R., p. 11), on October 9, 1974, in *John Rogers Malone v. Commonwealth, Ky.*, — S. W. 2d — (1975). Rehearing being denied on September 19, 1975, a mandate issued to the lower Court (T.R., p. 14, Appendage). On September 22, 1975, the same date as the receipt of the mandate, the Trial Court entered an Order directing, *inter alia*, forfeiture of the \$10,000 appeal bond and summoned Appellant to appear October 23, 1975 (T.R., p. 15).

Subsequently, Defendant in the above cited criminal appeal moved this Court for a stay pending a petition for certiorari to the Supreme Court of the United States (T.R., p. 15, Appendage). On October 22, 1975, this Court sustained Defendant's motion and ordered a stay of the mandate (T.R., p. 15, Appendage). On October 23, 1975, the day after said stay was entered, the Defendant failed to appear before the Trial Court whereby that Court entered Judgment on the forfeiture (T.R., p. 16). On October 28, 1975, Defendant voluntarily appeared in the Trial Court and it was ordered that he be remanded to jail and a new \$10,000 bond posted notwithstanding this Court's stay order (T.R., p. 16). On November 5, 1975, Appellant moved the Trial Court to vacate the Judgment (T.R., p. 17). On November 10, 1975, the Trial Court overruled said motion whereupon an appeal is brought to this Court.

FIRST ARGUMENT

The Trial Court's Order of Forfeiture of the Bail Bond Was Erroneous.

At the time of the order of forfeiture there had been neither a breach of the bail bond agreement nor a showing thereof, without which a forfeiture order could not issue.

The bail bond agreement of October 24, 1974 (T.R., p. 12, Appendage) provides that the Principal will render himself amenable to the orders and process of the Courts and that thirty (30) days after affirmance of his case will surrender himself to the Sheriff of

Jefferson County. Principal was at all times available and willing to submit himself to the proper authorities but at no time did he, his counsel, *or* Appellant receive notice, constructive or actual, for appearance prior to September 22, 1975.

A case, not controlling but helpful, is *U. S. v. Eisner*, 329 Fed. 2d 410 (6th Cir. 1964). There the Court reversed a Judgment of forfeiture of the appeal bond for want of a showing in the record that the Defendant, not otherwise required by the conditions of the appeal bond agreement, was ordered and refused to surrender himself for enforcement of the original Judgment.

It is particularly noteworthy in this regard that this Court implied, and justifiably so, in its order staying the mandate, that the appeal bond executed October 24, 1974, could stand for the bond pending a petition for certiorari to the United States Supreme Court, as such bond was thought to be then in effect.

The only indication in the record in the present case in support of the allegation that Principal/Defendant failed to appear when required is in the Judgment entered October 23, 1975, which was in reference to his nonappearance on said date. The Judgment, being thus entered on the day of the alleged breach, deprived Appellant of any opportunity, save post-Judgment motions, to show cause why Principal/Defendant failed to appear.

The Legislature has seen fit to vest in the Judiciary authority to enforce bail bond conditions for the protection of *all* parties. R.Cr. 4.26(1) provides:

“If there is a breach of a condition of a bond, the court shall declare a forfeiture of the bail or the money or bonds deposited as bail which forfeiture shall be noted of record and endorsed on the bond by the clerk of the court. Such endorsement shall be sufficient evidence of the forfeiture.”

The thrust of R.Cr. 4.26(1) derives from Section 93 of the now-repealed Criminal Code of Practice. This Section was interpreted to mean that upon Defendant's failure to appear, the Court had a duty to have entered on record the fact of the nonappearance and the order of forfeiture of the bail bond. *Commonwealth v. Grady*, 236 Ky. 98, 32 S. W. 2d 720 (1930). *Commonwealth v. Delk*, 171 Ky. 263, 188 S. W. 2d 376 (1916). Speaking of this Section, the Court in *Grady*, *supra*, said:

“ . . . it was the plain intent of the Legislature to require the court to have noted of record the nonappearance of the defendant, and to provide that forfeiture of the bail bond or the money deposited in lieu thereof should follow as a matter of course.”

In *Bonner v. Commonwealth*, 85 S. W. 1185 (Ky., 1905), the bail failed to answer a summons issued pursuant to an order of forfeiture wherein the Court said:

“ . . . all matters stated or necessarily implied from the statements in the summons are deemed admitted, if not denied, *provided the essential foundation for the forfeiture is in the record.*” (Emphasis added.)

Although the wording in R.Cr. 4.26(1) differs slightly from that in Section 93, Criminal Code of Practice, Appellants submit that the Legislature did not intend to dispense with the requirement of recording essential matters in the record. R.Cr. 4.26(1) merely simplifies the forfeiture procedure by making endorsement on the bond sufficient evidence of the forfeiture. Wherefore, absent a requirement to appear and noncompliance therewith, in fact and duly recorded, the forfeiture Judgment is fatal.

SECOND ARGUMENT

The Trial Court Erred in Entering Judgment After the Stay in That Such Stay Suspended and Rendered Void All Judicial Proceedings on the Original Judgment, Pending a Petition for Certiorari.

Thus, quite apart from the propriety of the forfeiture order of September 22, 1975, the Judgment was improper.

Appellant in no way means to imply that the examining Court was not a proper forum for the enforcement of the Judgment after this Court's mandate of September 19, 1975. Rather, it is Appellant's position that the lower Court was divested of jurisdiction and authority with the entry of the stay on October 22, 1975.

R.C.A. 1.445(b) grants the Supreme Court authority to issue a stay, Section 110 of the Kentucky Constitution makes the order binding on inferior tribunals, and R.C.A. 1.345(a) makes the stay effective on the date entered, unless otherwise ordered. As the stay

in the case at bar was entered one (1) day prior to the Judgment in question, said Judgment was void if the stay was valid. And the stay, being conditioned only upon the existence of a properly executed bail bond in the amount of \$10,000, was valid if a bond was operative.

If the Court finds reason to discount the assertions made in the First Argument as they relate to the forfeiture, whereby it be adjudged that the stay became effective only with the execution of the appeal bond of October 28, 1975, it is Appellant's belief that irrespective thereof, if the stay operated at all it served to render *pro non scripto* any and all judicial proceedings upon the enforcement of the original Judgment. Its purging, retroactive effect then turns not upon the date but upon the authority of the bench from whence it grew. And to the latter, there is no dispute.

Aside from the fact that "default judgments are not favored", *Bargo v. Lewis*, Ky., 305 S. W. 2d 757 (1957), and with deference toward this Court, Appellant submits that an unfavorable ruling here would most certainly lessen the force of this Court's orders, as it would allow our trial Courts to exact a higher level of assurance of enforcement than that demanded by the Supreme Court of this Commonwealth.

CONCLUSION

The Judgment in this matter should be reversed and Appellant released on the bond forfeited by such Judgment entered by the Trial Court.

Respectfully submitted,

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